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No. 394

In the Supreme Court of the United States

OCTOBER TERM, 1960

INTERNATIONAL ASSOCIATION OF MACHINISTS, AERONAUTICAL INDUSTRIAL DISTRICT LODGE 727 and LOCAL LODGE 758, AFL-CIO, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the Court of Appeals is reported at 279 F. 2d 761 (see Pet. 1a-10a). The decision and order of the National Labor Relations Board (R. 10-35) are reported at 123 NLRB 627.

JURISDICTION

The opinion of the court below was issued on June 4, 1960, a petition for rehearing was denied on July

7, 1960, and the decree was entered on July 18, 1960 (Pet. 1a, 13a, 2). The petition for a writ of certiorari was filed on September 7, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

The collective agreement between the Company and the Union provided in part that employees who were promoted out of the production unit and later sought to transfer back to it would retain seniority rights in that unit if they were not represented by another labor organization in the unit to which they had been promoted, but that they would not retain such rights if they were so represented. The agreement further provided that seniority rights so lost could be restored by mutual agreement of the Company and the Union. Three employees were promoted out of the production unit to the engineers unit; when a layoff affected the latter unit, the Company sought to transfer them back to the production unit. Because the three had been represented by another union while in the engineers unit, they lost their seniority in the production unit, and were therefore discharged. The questions presented are:

1. Whether the Board properly held that a contract which conditioned seniority rights on whether employees had or had not exercised their statutory right to select a bargaining representative unlawfully restrained or coerced employees in the exercise of that right.

2. Whether the Board properly ordered the Union to restore to the three employees the wages and status they lost because the Union applied the unlawful contractual provision to cause their discharge.

3. Whether the Board properly ordered the Union to stop giving effect to any agreement with the Company which conditioned seniority on union representation or which delegated to the Union the right to determine seniority.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*), in addition to those set forth at Pet. 3 are as follows:

> Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).
>
> Sec. 8. * * * (b) It shall be an unfair labor practice for a labor organization or its agents—
>
> (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: * * *.

STATEMENT

A. The Board's Findings of Fact

The Burbank, California, plant of Menasco Manufacturing Company, contains a number of separate departments (R. 13). Employees in some of these departments are represented by a labor union for purposes of collective bargaining, but the employees in some other departments do not bargain collectively (R. 13; 43-44, 81). The petitioners represent the various machinists and inspectors; the American Federation of Technical Engineers (AFTE) represents process engineers, the next higher grade classification (R. 13-14; 46-47, 76).

Prior to May 1956, petitioners had a contract with the Company which provided that if an employee in the machinists' unit was advanced to a higher job (i.e., to process engineer) and was thereafter laid off for lack of work, he could return to the machinists' unit without loss of seniority, and employee James A. Madison in fact did so return in March 1956 (R. 57, 69). At that time, the engineers were not represented by any labor organization (R. 50). However in May 1956, as the result of a Board election, the AFTE was certified as the collective bargaining agent for a unit composed of process and other engineers. (R. 59).

On July 2, 1956, petitioners and the Company signed a two-year contract covering the unit of machinists, which provided *inter alia* (R. 12; 89-96; emphasis supplied):

ARTICLE IV

SENIORITY

Sec. 1. Basis for Seniority

4.16 * * * An employee who has acquired at least one (1) year seniority in the bargaining unit and who moves to an occupation in the Company *not represented by another collective bargaining agent*, and who later moves back into an occupation represented by the Union *shall have seniority from the latest date of hire with the Company.*.

An employee who moves into an occupation *represented by another collective bargaining agent*, and who later moves back into an occupation represented by the Union, *shall have seniority from the date of the move back into the bargaining unit.*

The Company and the Union may by mutual agreement restore seniority to any employee who moves back into the bargaining unit under any of the three categories mentioned above.

4.32 Bumps—* * *. An individual in the employ of the Company who had established seniority in excess of one (1) year at the time of movement to a position outside the bargaining unit shall at time of layoff or release (but not discharge) be given the opportunity to bump into the bargaining unit (last previously held classification in reverse order) provided he possesses greater seniority than the employee bumped and meets the seniority requirements as set forth in Paragraph 4.16 * * *.

Employee Madison was aware of this provision and it gave him concern when he was again advanced from the machinists' unit to process engineer in August 1956 (R. 58, 67-68). Similarly, employees Gibbs and Light were transferred from occupations in the unit which petitioners represented to jobs as process engineers in the unit represented by the Engineers (R. 28; 46-47, 51, 58, 65-66). Each of them at the time of his transfer had acquired more than one year's seniority in the unit which petitioners represented (*ibid.*). On March 14, 1958, these employees had greater seniority than other employees then occupying jobs in the unit represented by petitioners (R. 28-29; 50, 65, 66, 82, 88-89).

On that date, Gibbs, Light and Madison were in a group of process engineers the Company had decided to lay off for lack of work (R. 28; 65, 82). On several occasions before the effective date of their layoff, Gibbs and Madison, accompanied by James High, business representative of the Engineers, met with officials of the Company and petitioners and requested that the three employees be permitted to "bump back" into the unit represented by petitioners (R. 28-29; 42-50, 60-65, 71-72, 83, 87-89).

At these conferences, the Company's representatives stated that it would be "very happy" to restore seniority to the three employees in question, thus enabling them to bump into the IAM unit and thereby remain in the Company's employ, but that under the contract it could not do so without a request from the IAM (R. 29; 55-56, 61-63, 88-89). Petitioners

refused to permit the restoration of seniority which the employees had lost when the engineers unit acquired a bargaining representative (R. 29; 50, 55-56, 58, 89). As a result, the three employees were laid off on March 14 (R. 29; 54, 60, 65-66).

B. The Board's Conclusions and Order

On the foregoing facts the Board concluded that the three employees were deprived of their seniority, and hence of the right to return to their former jobs, solely because they were in a unit which had a collective bargaining representative; and, therefore, that the net effect of the application and enforcement of the seniority clauses of the contract was to penalize the employees for exercising their right to be represented by a union, and thus to discourage union membership within the meaning of Section 8(a)(3) of the Act. Accordingly, the Board concluded that petitioners violated Section 8(b)(1)(A) and (2) of the Act. (R. 30.)

The Board's order requires petitioners to cease and desist from maintaining or giving effect to any provision of a contract which unlawfully discriminates as to seniority or gives petitioners the right to determine seniority (R. 30). Affirmatively, the order requires petitioners to notify the Company that petitioners consent to the restoration of the seniority of the three employees and to their "bumping" employees of lesser seniority in petitioners' unit (R. 31-32). The order also directs petitioners to make whole the three employees for loss of pay, and to post the usual appropriate notices (R. 32-35).

C. The Decision of the Court Below

The court below, except for minor modifications of the order not material here, sustained the position of the Board (Pet. 1a-10a). The court observed (Pet. 7a) that "The plain, if not indeed almost irresistible, inference to be drawn with reason from the questioned provisions of the IAM-Menasco agreement is that the contract tends to discourage membership in unions other than IAM by those employees who transfer from the production unit." The court further stated (Pet. 8a), "* * * logic compels the conclusion that, as a 'natural consequence' of the contractual provisions in question, employees in the production unit would be discouraged from seeking new union representation upon transfer to other units, if the price of such representation were loss of seniority and 'bumping-back' privileges within the production unit."

ARGUMENT

1. The decisive fact in this case is that three employees lost employment because they exercised their statutory right to be represented by a labor organization. The Company was prepared to employ the three in the production unit when the petitioners objected, pointing out that under the contract the men had lost their seniority solely because, while in another unit, they had been represented by a union. A plainer case of discriminatory treatment based on the exercise or non-exercise of statutory rights would be difficult to devise. Petitioners' suggestion, taken from "refusal to bargain" cases, that the Board is

here improperly concerned with the substantive terms of collective bargaining agreements (Pet. 10-11) is wide of the mark; where a contract provides on its face for discriminatory treatment violative of the Act, the Board's authority to declare the contract invalid has never been doubted. And petitioners' attempt to justify the discrimination in this case as "unit" rather than "union" discrimination (Pet. 19-24) is likewise beside the point. Of course, employees in different units may be treated differently, but under the statute such differentiation may not, as it did here, turn on whether the employees in a particular unit exercise their statutory right to choose a bargaining representative.

2. The Board's order restoring seniority and back pay to the three employees returns them to the status and compensation their employer would have given them but for the Union's unlawful insistence on applying a discriminatory contract. Where a status, whether that of employee or seniority among employees, is lost because of the exercise of a statutory right, the Board in vindication of the statutory right may properly order the status restored. *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U.S. 177, 187-189. Petitioners may, as they contend (Pet. 29-30), execute a new agreement which will withhold seniority from all transferees, but such an agreement would operate *in futuro*, whereas, as the court below observed (Pet. 9a), "violation of rights protected by the Act as to the three employees here is now *fait accompli* * * * future conduct that is lawful cannot purchase relief from liability for past conduct that was not lawful."

3. In remedying the unfair labor practice, the Board, *inter alia*, directed petitioners not to enter into a contract which delegated to them the right to determine seniority status (last clause of paragraph 1(a), R. 31). Petitioners rely upon this minor aspect of the case in an attempt to secure review of the Board's position that the delegation of exclusive control over seniority to the union violates the Act, urging that the issue is analogous to that before this Court in the "hiring hall' cases (Pet. 11-19). But petitioners are bound to concede, as they do (Pet. 15-16), that the Board's position on union control over seniority has met with uniform judicial approval,[1] and in none of the petitions for certiorari or oppositions thereto in the "hiring hall" cases was any claim advanced that the decisions adverse to the Board on hiring halls were in any way in conflict with the holdings of the courts on seniority clauses. The Board's own leading decision on hiring halls (*Mountain Pacific Chapter*, 119 NLRB 883, 893-900) contains no reference to the seniority cases and proceeds on a different theory from that enunciated in those cases.

Nor are petitioners aided by asserting that the provision in their contract for restoration of seniority by "mutual agreement" distinguishes this case from those in which the courts have condemned union control of seniority (Pet. 15). To require the Union's

[1] To the four cases cited by petitioners (Pet. 15-16) should be added *Chief Freight Lines Co.*, 111 NLRB 22, 34, enforced *sub nom. National Labor Relations Board* v. *Oklahoma City General Drivers, Warehousemen and Helpers, Local Union 886*, 235 F. 2d 105, 106 (C.A. 10).

agreement to restoration of a status discriminatorily lost is to vest the Union with power to perpetuate the loss of status. In any event, the provision for restoration of seniority by "mutual agreement" is peculiar to the contract in this case, and thus presents no question of importance in the administration of the Act. Indeed, if, as petitioners suggest, the presence of the "mutual agreement" clause in this contract distinguishes it from the other cases, this militates against this Court's reaching the broader issue which petitioners tender respecting the legality of an unequivocal grant of unilateral control to the Union over seniority.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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